



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
<http://www.blm.gov/ak>



In Reply Refer to:
1864 (AK927)

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Memorandum

To: File FF-94672

From: Jack Frost, Navigable Waters Specialist (AK927)

Subject: Federal Interest in Lands Underlying Scottie Creek in the Tanana River Subregion, Alaska

The State of Alaska (State) filed an application, dated January 27, 2006, for a recordable disclaimer of interest (RDI) for the lands underlying Scottie Creek. Scottie Creek is located in eastern Interior Alaska, about 250 miles southeast of Fairbanks.¹ It heads in Yukon Territory, Canada, and flows for a total of about 50 miles southwesterly into Alaska to its confluence with the Chisana River.² The portion of Scottie Creek within Alaska is approximately 20 miles long and is located within Township 11 North, Range 22 East, and Tps. 10 N., Rs. 22 and 23 E., Copper River Meridian (CRM), Alaska.³ The Alaska Highway crosses Scottie Creek about two miles west from the border of Canada.

The State described the lands as follows: all submerged lands within the bed of Scottie Creek between the ordinary high water lines of the left and right banks, beginning at the sixty-foot-wide neutral strip from the United States-Canada International Boundary, located in Sec. 24, T. 10 N., R. 23 E., CRM, downstream to its confluence with the Chisana River in Sec. 34, T. 11 N., R. 22 E., and Section 3, T. 10 N., R. 22 E., CRM. With its application, the State submitted a map entitled "Recordable Disclaimer of Interest Application Scottie Creek," showing the general location of the applied for water body.⁴ In its application, the State erroneously described Scottie Creek as flowing through lands withdrawn under Public Land Order (PLO) 386. In a letter dated April 26, 2006, the State amended its application to modify its legal description to exclude reference to PLO 386.⁵

¹ Michael Menge, Commissioner, State of Alaska, Department of Natural Resources to Henri Bisson, State Director, BLM-Alaska, January 27, 2006, file FF-94672 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in this file.

² Orth, *Dictionary of Alaska Place Names*, 845

³ All river mile estimates were obtained using the "measure" function in Google Earth.

⁴ Note: The legal land description noted in the State of Alaska's application is the controlling document for the location of the water body.

⁵ Wyn Menefee, Chief of Operations, State of Alaska, Mining, Land and Water to Carolyn Spoon, Chief, Branch of Lands, April 26, 2006, file FF-094672 (1864), Alaska State Office, BLM records.

The State's application for an RDI is based on the Equal Footing Doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or any other legally cognizable reason. The Bureau of Land Management (BLM) may disclaim interest in the submerged lands on any of the grounds that apply. The State's application for lands underlying the subject water bodies must also meet the regulatory requirements (43 CFR Subpart 1864).

In support of its application, the State submitted the following documents: four BLM memorandums dated April 15, 1983,⁶ June 29, 1994,⁷ August 25, 1994,⁸ and September 22, 1994;⁹ State of Alaska Department of Natural Resources (DNR) historians' report dated August 1982 outlining contemporary uses of lakes in the area;¹⁰ and a copy of page 30 in the book by Robert A. McKennan entitled *The Upper Tanana Indians*, wherein it is stated that the Natives used a trail from the Upper Tanana River to the Yukon River by way of Scottie Creek and White River for trading trips. McKennan did not state whether this was a winter trail or a summer trail. The State later provided additional information regarding Scottie Creek: a manuscript by Norman A. Easton entitled "An Ethnohistory of the Chisana River Basin" and various documentation on current use, physical character of the stream, and the types of craft currently used on Scottie Creek.¹¹

Land Status

With the exception of the sixty-foot-wide neutral strip, riparian lands in the U.S. along Scottie Creek were not reserved at the time of statehood. Today, much of the creek is located in the Tetlin National Wildlife Refuge (established under Public Law 96-487 on December 2, 1980), managed by the U.S. Fish and Wildlife Service. Approximately one mile upstream of its confluence with Chisana River, there is one certificated Native allotment and one Native veteran allotment application, both adjacent to Scottie Creek. At the bridge crossing Scottie Creek (Scottie Creek Bridge), located at approximate creek mile 17, there are two patented Trade and Manufacturing (T&M) Sites.¹² From the Scottie Creek Bridge to the Canadian border, the State owns the remaining riparian lands in sections 13 and 24, T. 10 N., R. 23 E., CRM.¹³

⁶ Robert W. Faithful, Acting Assistant to the State Director for Conveyance Management (913) to Acting Chief, Division of ANCSA and State Conveyances (960), subject: "Final Navigability Determination for State Selections in the Upper Chisana and Ladue River Drainage Areas," April 15, 1983, FF-044624 BLM records.

⁷ Dot Tideman, Navigable Water Specialist, subject: "Navigability Report: Scottie Creek, Window 1212; Group Surveys 177 [sic] and 242," June 29, 1994, attachment to Chief, Navigability Section (924) to Chief, Branch of Survey Preparation and Contracts (923), subject: "Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242)," June 24, 1994, F-17780 BLM records.

⁸ Navigable Water Specialists (924) to File F-88517 (2620), subject: "Additional Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242) (Report dated June 24, 1994)," August 25, 1994, BLM records.

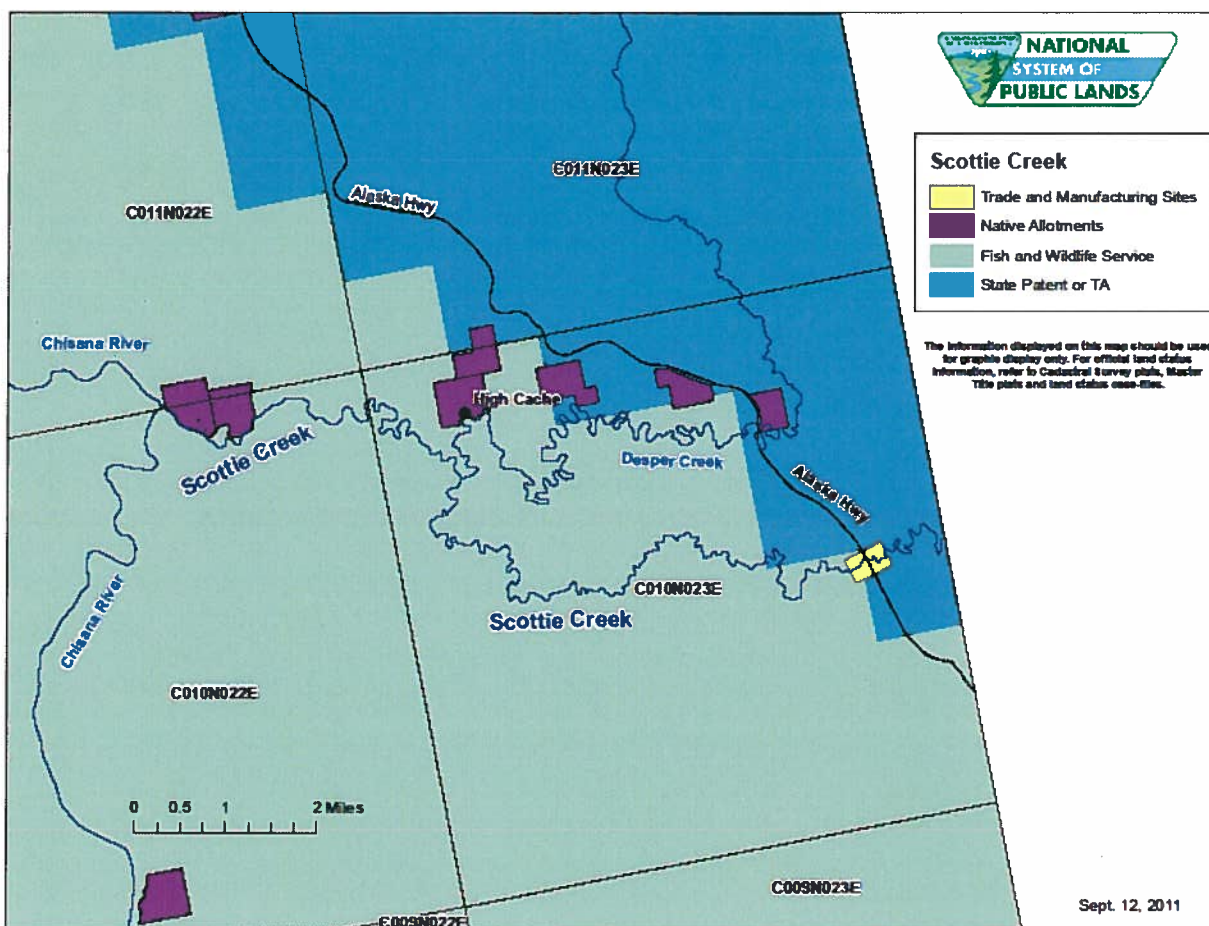
⁹ Chief, Navigability Section (924) to Chief, Branch of Survey Preparation and Contracts (923), subject: "Additional Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242)," September 22, 1994, F-024675 BLM records.

¹⁰ Dale A. Stirling, Historian, and Gary C. Stein, Supervising Historian, subject: "Contemporary Uses of Lakes in the Northway Region of Alaska," August 1982, Division of Research and Development Policy Research and Land Entitlement, State of Alaska, Department of Natural Resources.

¹¹ These documents are located in file FF-094672, BLM records.

¹² See files FF-000897 and FF-001025, Trade and Manufacturing Files, BLM records.

¹³ Sharon E. Fleek, Chief, Branch of Northern Adjudication, Tentative Approval, December 19, 1994, F-88517, BLM Records.



Previous Navigability Determinations

Since the 1970's the BLM has made several navigability determinations for different reaches of Scottie Creek. The first determinations were made in connection with applications for the two T&M sites, both located adjacent to the Scottie Creek Bridge and both including Scottie Creek. Fuller S. Thompson's site, surveyed as Lot 2 of U.S. Survey 5127, encompasses a reach of Scottie Creek below the Scottie Creek Bridge. William Trimmingham's site was surveyed as Lot 1 of U.S. Survey 5127 and included a reach of Scottie Creek upstream of the Scottie Creek Bridge. The submerged lands were not excluded in Patent Nos. 50-76-0176 (Thompson) and 50-76-0177 (Trimmingham).¹⁴

In the late 1970's and early 1980's, the BLM again considered the navigability of Scottie Creek, this time in connection with Alaska Native Claims Settlement Act (ANCSA) land selections. In 1979 and 1980, the BLM identified all tributaries (including Scottie Creek) of the Chisana River

¹⁴ See file FF-000897 (Fuller S. Thompson) and FF-001025 (William Trimmingham), Trade and Manufacturing Files, BLM records. There are no documents in the files discussing the navigability of Scottie Creek. In their applications to purchase the sites, however, the applicants confirmed that no portion of the lands abut more than 80 rods of navigable waters.

as non-navigable.¹⁵ However, in 1983, the BLM reversed its previous findings, and recommended that the lower reaches of Scottie Creek in T. 11 N., R. 22 E., CRM, be considered navigable.¹⁶ These recommendations were not incorporated into a decision to convey lands to the Native corporations. The land selections were subsequently relinquished by the Native corporations.¹⁷ The BLM, in 1994, considered the navigability of the upper reaches of Scottie Creek, for lands selected by the State of Alaska. In a BLM memo dated September 22, 1994, Scottie Creek was determined to be navigable east of the Scottie Creek Bridge in Secs. 13 and 24, T. 10 N., R. 23 E., CRM. The determination was incorporated into a decision to grant tentative approval (TA) to the State. The submerged lands of Scottie Creek in these sections were excluded from the conveyance.¹⁸

The U.S. Coast Guard made a “jurisdictional decision” on the navigability of Scottie Creek, dated April 13, 1995, stating that it “is not a navigable waterway of the United States for the purpose of asserting independent Coast Guard jurisdiction.” Their report states that “there is no evidence of present commercial use” nor is it “currently susceptible for use as a highway for substantial interstate or foreign commerce.” In addition, the Coast Guard decided that due to the “lack of accessibility and remote location render the Creek insusceptible, even for commercial river rafting and guide services.”¹⁹

Physical Character

Scottie Creek originates in several small lakes in Canada. The portion of Scottie Creek in Alaska meanders and flows in a single channel through a wide lake-filled lowland region to empty into the Chisana River. Scottie Creek is the Chisana River’s largest tributary. Tributaries to Scottie Creek include Desper Creek at about river mile 6 and Little Scottie Creek at about river mile 19. The water in Scottie Creek is strongly humic-stained and supports populations of humpback whitefish, grayling, northern pike, burbot, longnose suckers, and sculpin.²⁰

The U.S. Fish and Wildlife Service have studied the hydrology of Scottie Creek. They installed a continuous recording flow monitoring gauge on Scottie Creek at the highway bridge on June 15, 2005. The gauge is periodically checked by Service hydrologists. Also, water quality samples are collected at this site four to six times per year.²¹ Data is continuing to be collected

¹⁵ Chief, Division of Resources to Robert Arndorfer, State Director, Alaska, and Clair Whitlock, Acting State Director, subject: “Navigable and Nonnavigable Waters in the Northway Area, Eastern Alaska,” March 22, 1979, and March 28, 1980, BLM records. These memorandums were found during normal investigation by the writer and were not provided by the State of Alaska in support of its application.

¹⁶ Robert W. Faithful, Acting Assistant to the State Director for Conveyance Management (913) to Acting Chief, Division of ANCSA and State Conveyances (960), subject: “Final Navigability Determination for State Selections in the Upper Chisana and Ladue River Drainage Areas,” April 15, 1983, FF-044624 BLM records.

¹⁷ Linda Suttles, Land Law Examiner, Decision, May 15, 1997, F-013597 BLM Records.

¹⁸ C. Michael Brown, Chief, Navigability Section, to Chief, Branch of Survey Preparation and Contracts, September 22, 1994; and Sharon E. Fleek, Chief, Branch of Northern Adjudication, Decision, December 19, 1994, F-88517, BLM Records.

¹⁹ Department of Transportation, U.S. Coast Guard “Jurisdictional Decision for Scottie Creek,” April 13, 1995.

²⁰ Richard A. Valdez, Ph.D., “Fisheries Survey of Tanana River Tributaries Along The Alcan Gas Pipeline Route,” August 10, 1976, Bio/West, Inc.

²¹ Electronic mail from Warren Keogh, Water Rights Coordinator, U.S. Fish and Wildlife Service to Jack Frost, Navigable Water Specialist, BLM, October 30, 2007, FF-94672, BLM Records.

but Alan Peck, Hydrologist, U.S. Fish and Wildlife Service, stated that some preliminary data was available to review.²² The preliminary data received from Mr. Peck, in the form of excel spreadsheets, details sampling during the years of 2005 through 2007. The tables document gauge readings and also highlight two extreme water events for low and high water on Scottie Creek during those three years. These recordings show the lowest water stage of 110 cubic feet per second (cfs) happened on July 27, 2007 and the highest water stage of 1613 cfs occurred on May 9, 2007. Additional data listed in the table documenting these two events details that at the lowest water stage (110 cfs) Scottie Creek was 50 feet in width and about 7 feet deep at its deepest point; however, most of the channel was about 3-4 feet deep. The data for the high water stage (1613 cfs) listed Scottie Creek to be 91 feet wide and almost 18 feet deep at its deepest point, while most of the channel was about 14 feet deep. Mr. Peck stated that even at the high water stage there would be enough space between the water and the bridge for a boat to travel.²³

What little else is known about the creek's physical character comes from BLM interviews with local residents and a 1994 field trip to the upper reaches of Scottie Creek. Scottie Creek in Alaska is a stained and deeply incised stream that flows with a slow current. Gradients are less than five feet per mile. According to various reports, stream depths above the bridge vary from 3 to 10 feet deep; widths range from 50 to 70 feet.²⁴ The U.S. Coast Guard noted in its decision on Scottie Creek that the creek has an average depth at mean high water of 7 feet and its width varies from 60 to 150 feet.²⁵ Impediments to navigation on upper Scottie Creek (upstream of the Alaska Highway) include beaver dams, sweepers, and trees that have fallen into the creek. These impediments are known to be cleared out by high water events or boaters cutting the jams out of the way with the aid of chainsaws or other hand tools.²⁶

Native Settlements

Historically, Natives occupied camps along Scottie Creek on a seasonal basis. Ethnohistorians refer to the Scottie Creek band, which was known to occupy the area from mid-Chisana River, approximately the base of the Nutzotin Mountains, downriver past Scottie Creek to Gardiner Creek, as well as some area to the east into the Yukon Territory. This area extends approximately 30 to 40 miles north-south and 20 miles east-west. During the 1920's and 1930's, the Scottie Creek band within Alaska was known to maintain camps near the mouth of Scottie Creek, at High Cache (a trading post on Desper Creek), and near the U.S.-Canada border at both Scottie Creek and Little Scottie Creek.²⁷ Access to these camps was available through the trail system located along Scottie Creek.

²² Phone interview with Alan Peck, Hydrologist, U.S. Fish and Wildlife Service, 907-786-3662, with Jack Frost, Navigable Water Specialist, BLM, December 6, 2007, FF-94672, BLM Records.

²³ Electronic mail from Alan Peck, Hydrologist, U.S. Fish and Wildlife Service to Jack Frost, Navigable Water Specialist, BLM, December 13, 2007, FF-94672, BLM Records.

²⁴ The reported depths and widths of Scottie Creek are only estimates. Scientific measurements, other than U.S. Fish and Wildlife Service, have not been made.

²⁵ U.S. Coast Guard, April 13, 1995.

²⁶ Dot Tideman, Navigable Waters Specialist (924) to File F-14912 (75.4), subject: "Interviews on Water Bodies on Lands in Window 1212 (Group Surveys 117 and 242)," May 24, 1994, BLM Records.

²⁷ Easton, *An Ethnohistory of the Chisana River Basin*, 80-81.

Native Trails

There were four historical bands of Athabaskan Indians in the Northway area prior to 1960: Scottie Creek, Chisana, Old Nabesna, and Upper Nabesna. Each of these bands had a “chief,” or a “respected man selected by elders for hunting ability and generosity.” Trails within a band’s territory were the property of the chief and permission had to be granted by the band for use by other bands.²⁸ Trails were important to the Natives for many reasons which include contact with other villages and camps, finding and transporting of game animals and fish, and locations that commemorate many important occurrences in their history.²⁹ The route of the trail system spider webs throughout the Chisana River basin following such physical features as waterbodies, hills, and mountains. One trail in this system is located adjacent to Scottie Creek, beginning at the confluence with the Chisana River and continuing upstream past the border and into Canada.³⁰ This trail was used to access the camps located on Scottie Creek and other camps in Canada. Specifically, the Scottie Creek trail to the White River was known to be one of the routes to the trading posts on the Yukon for the Upper Tanana natives.³¹

Native Water Transport

Water travel by the Upper Tanana people for subsistence activities included three types of watercraft: birch bark canoes, skin boats, and log rafts. The birch bark canoes built were typically 12 to 16 feet long, 2 feet wide, exceptionally light weight (about 40 pounds), covered with birch bark, and could accommodate one to two people. This size and weight of these canoes made it possible for them to be carried from one water body (especially lakes) to another easily. Navigation up small moderate current streams in these canoes required the use of two poling sticks and a single paddle was employed on downstream and lake travel. These canoes were not made for use in fast currents. Skin boats were used for crossing rivers and carrying heavy loads. These well-constructed boats are reported to be 17 feet long, 4 feet wide, and 2 feet deep. The frame was covered by either moose or caribou skins that were not tanned but with the hair removed. Pitch from spruce was used to patch any holes. These boats were capable of carrying up to a dozen people or heavy loads and fewer passengers. They propelled these boats by several people paddling and steered by a single helmsman. Log rafts were occasionally built for downstream travel on the rivers. They consisted of six to ten logs lashed to a number of crosspieces by willow. They were probably steered by the use of a long pole.³²

Alaska Highway

The Alaska Highway crosses Scottie Creek Bridge at milepost 1223.4. The Alaska Highway was built from Dawson Creek, British Columbia, to Fairbanks in just over eight months to provide transportation of war supplies. Construction crews started at each end of the route and proceeded to build the road and meet in the middle. The construction of the last remaining gap of the

²⁸ Case, *Wild Resource Use in Northway, Alaska*, 20.

²⁹ Easton, 72.

³⁰ A map of these trails is located in Easton, 75.

³¹ McKennan, 30.

³² Keogh, 40-41.

northern and southern portions of the Alaska Highway occurred on October 25, 1942, ten miles south of Beaver Creek, Yukon Territory.

The highway dramatically changed the lifestyles of the people living near Scottie Creek. Development within the region increased and the transportation of goods and services to regional centers became cheaper than the traditional methods of water transport. The highway provided residents with the ability to travel to nearby urban centers for health care, to purchase less expensive goods and supplies, other personal necessities, and seek jobs. Natives were drawn to wage labor that was available during the construction phase of the highway, and this caused the abandonment of most villages that were not along the highway. Residents of Scottie Creek and High Cache moved to either Northway or Snag (Canada) for these jobs. In general, the benefits of the highway created a transition where people started relying less on the traditional nomadic/subsistence lifestyle to a more modern sedentary lifestyle. The road also opened access for people who are not residents of the region to hunt and fish in direct competition with locals.

The presence of the two T&M sites located at the Scottie Creek Bridge may have contributed to the competition. Fuller Thompson filed for his T&M site (50-76-0176) on March 20, 1968, listing in his application that the property was to be used for a gift shop, selling hunting, fishing, and trapping licenses, and cabin rentals. William Trimmingham filed an application for his T&M site (50-76-0177) on May 13, 1968, and listed that the property was to be used for cabin and boat rental.

Evidence of Commerce and Boat Use

There is historical evidence of use of Scottie Creek from the Chisana River to Desper Creek as a highway of commerce. Every June in the 1930's, for an undetermined number of years, traders operating posts on the Upper Tanana River annually ascended Chisana River, Scottie Creek, and Desper Creek (a tributary of Scottie Creek at about river mile 6) to the trading post known as High Cache, to trade for furs with the Scottie Creek band. Bessie John, an elder of the Scottie Creek band, recalled how when she was about 13 years old (circa 1934), traders Herman Kessler and Teddy Lowell arranged the time for the annual rendezvous at High Cache. The trading event lasted three days and they traded supplies that included clothes, lard, tea, "chew," rice, flour, dried apples, dried peaches, prunes, and raisins. According to Bessie John, the traders had a "big boat, a fish boat," with a pointed bow, with which they hauled trading goods and furs. Sometimes they brought as many as five motor boats with them during this trading event.³³

There is no known evidence of use of Scottie Creek as a highway of commerce beyond the mouth of Desper Creek. However, there is one documented instance where a local Native ferried people across Scottie Creek for pay. On June 13, 1942, White River Johnny, a Native resident of the area, was paid to transport U.S. Army Engineers, across Scottie Creek near the border with Canada in his birch bark canoe. The Engineers were in the area surveying for the construction of the Alaska Highway, and it took White River Johnny twelve trips to transport all of the gear and people. He was paid a total of \$5.00 in food.³⁴

³³ Keogh, 55-56.

³⁴ Easton, 211-212.

In the 1960's, local residents and BLM officials evidently considered Scottie Creek non-navigable where it crossed two T&M sites adjacent to the Alaska Highway. In the late 1960's, several people applied for T&M sites along the Alaska Highway at the Scottie Creek Bridge. Catering to Alaska Highway travelers for the most part, the operators built a gift shop, cabins for rent, campgrounds along the creek, and trails and roads to the cabins and campground. In his notice of location, William Trimmingham noted his intent to rent cabins and boats. It is not known whether he actually rented boats for use on Scottie Creek. He did not mention boats in subsequent filings with the BLM. He and the other operator, Fuller Thompson, did have cabins for rent, however.³⁵ As noted earlier, the submerged lands within the boundary of the T&M sites were not excluded from the surveys and patents.

In the early 1980's, while investigating lower Scottie Creek in a State-selected township (T. 11 N., R. 22 E., CRM), the BLM learned not only of the former traders' past use of the creek to reach High Cache, but also that local residents and fur trappers used boats on the upper stretches of the creek. The BLM examiner wrote: "According to BLM Fortymile Resource Area personnel, canoe, kayaks, and small flat-bottomed river boats do use the creek downstream of the Alaska Highway bridge. This use is primarily for access to hunting and fishing areas. In addition, they thought that trappers used the river [sic] during the fall in boats to haul in supplies and build and maintain line cabins for winter trapping by snowmobiles. In addition, access and egress to Scottie Creek may be possible from the Alaska Highway." Considering all the evidence then available, the examiner concluded that "practical navigability ends at some point in Canada; thus the lower reaches of Scottie Creek are navigable and the upper reaches are nonnavigable."³⁶

During the early 1990's, the BLM collected additional evidence of use of Scottie Creek, primarily the upper reaches in State-selected Secs. 13 and 24, T. 10 N., R. 23 E., CRM. Much of this information, obtained through interviews with local residents, consists of recreational boating for hunting and fishing purposes. Brady Jimmy used a sixteen-foot-long boat to ascend the creek from its mouth into Canada. Bessie John recalled canoeing down Scottie Creek in Canada to High Cache and the Chisana River with a load of supplies and moose meat. The canoe could hold four people. Danny Grangaard of the Alaska Department of Fish and Game recalled ascending Scottie Creek from the bridge into Canada with a sixteen-foot-long airboat carrying 300 to 500 pounds. He has also made this trip in a 17.5-foot canoe and a fourteen-foot airboat carrying two people and 800 pounds of supplies. He claimed, too, that residents of Northway had taken boats up Chisana River and Scottie Creek as far as the bridge. David Dapkus of the U.S. Fish and Wildlife Service stated that he had operated boats on Scottie Creek from the Chisana River to the bridge, and he knew that people had used "johnboats" on the reach from the bridge to the Chisana River and had taken canoes up the creek from the bridge. He and a passenger had also taken a nineteen-foot-long canoe loaded with about 600 pounds of supplies down the creek from the bridge. David James claimed that he and his sons had descended

³⁵ William Trimmingham, Notice of Location of Settlement or Occupancy Claim, May 13, 1968; William Trimmingham, Application to Purchase Trade & Manufacturing Site and Petition for Survey, August 3, 1971, file FF-001025, BLM records; and Fuller Seth Thompson, Notice of Location of Settlement or Occupancy Claim, March 20, 1968, and Fuller S. Thompson, August 11, 1971, file FF-000897, BLM records. Thompson died in 1972. See *Fairbanks Daily News-Miner* clipping, February 25, 1972, in BLM casefile.

³⁶ C. M. Wheeler, Navigability Report Nabesna-SS-83-04, April 11, 1983, file FF-044624, state selection files, BLM records.

Scottie Creek from the bridge to the Chisana in twenty-foot-long freight canoes and riverboats carrying 1,500 pounds of supplies.³⁷ Finally, during a BLM field investigation of Scottie Creek, two BLM representatives and one State employee used a fifteen-foot-long canoe with a six-horsepower outboard motor to run upstream from the Scottie Creek bridge to the Canada border.³⁸

Conclusions

The Federal test of navigability is found in *The Daniel Ball*, 77, U.S. (10 Wall.) 557 (1870). The U.S. Supreme Court stated: “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

In assessing the navigability of inland water bodies, the BLM relies upon this test as well as Federal statutes, Federal case law, and the advice of the Interior Department’s Solicitor’s Office. Relevant Federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. Associate Solicitor Hugh Garner’s memo of March 16, 1976, (“Title to submerged lands for purposes of administering ANCSA”) and Regional Solicitor John Allen’s memo of February 25, 1980 (“Kandik, Nation Decision on Navigability”) provide valuable guidance on applying title navigability law in Alaska. The BLM also considers the application of the navigability test made in Alaska specific cases such as *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989). In cases concerning prestatehood reservations, BLM uses criteria set out and applied by the Supreme Court in *Alaska v. U.S.*, 545 U.S. 75 (2005) (Glacier Bay).

The 1979 and 1980 BLM navigability determinations listing Scottie Creek as non-navigable did not consider the commerce information where traders boated on Scottie Creek upstream to the confluence with Desper Creek to gain access to High Cache. The Coast Guard decision of 1995 mentions the possibility of the traders commercial activity at High Cache but discounted it as “anecdotal and unclear.” It is not clear if the Coast Guard had the benefit of the U.S. Fish and Wildlife Service interview with a Native elder relating her experiences in the 1930’s, when the traders and Natives met at High Cache to trade goods. We feel that this was a significant piece of evidence that was missing from both of the earlier BLM determinations and the Coast Guard decision. Therefore, this navigability determination takes into account all available evidence of Scottie Creek downstream of U.S. Survey 5127, near the Scottie Creek Bridge, since these lands are still in federal ownership.

No evidence of commercial boat traffic on Scottie Creek above the mouth of Desper Creek was found. However, local residents and government officials report that Scottie Creek from the Chisana River to the Alaska Highway is physically susceptible to use for commercial freight boat operation. The creek is wide and, although there is no available hard data, local residents report that there is at least three feet of water in the creek up to Scottie Creek Bridge.

³⁷ Dot Tideman, “Navigability Report: Scottie Creek: Window 1212; Group Surveys 177 and 242,” September 20, 1994, copy in file FF-094672, BLM records.

³⁸ Dot Tideman and Jack Frost to File F-88517, August 25, 1994, BLM records. This is a report, with photographs, of the field trip.

We conclude that Scottie Creek from its mouth on the Chisana River upstream to the boundary of U.S. Survey 5127, just downstream of the Alaska Highway, was susceptible for travel, trade, and commerce at the time of statehood. The historical record shows that in the early 1930's Upper Tanana River traders operated freight boats up the Chisana River and Scottie Creek to High Cache on Desper Creek. Here they traded with members of the Scottie Creek band of Athapaskan Indians. When and why these trading journeys ceased is unknown. Possibly the Scottie Creek band abandoned its migratory lifestyle and settled at Northway or Nabesna. Certainly, after the completion of the Alaska Highway and the outbreak of World War II, the traders practically ceased operating freight boats on the Upper Tanana.

The navigability of Scottie Creek in U.S. Survey 5127 is not at issue here. Scottie Creek was not meandered and segregated from the survey, and the submerged lands were included in two patents for trade and manufacturing sites. The United States no longer has an interest in Scottie Creek within U.S. Survey 5127. The State of Alaska owns all submerged lands of Scottie Creek, pursuant to the Submerged Lands Act of 1988, from the east boundary of U.S. Survey 5127 upstream to and through Secs. 13 and 24, T. 10 N., R. 23 E., CRM. The BLM determined Scottie Creek navigable in this reach and, as such, the United States no longer has an interest in these lands.³⁹ Therefore, I recommend that the State's application for a recordable disclaimer of interest in Scottie Creek be approved.

³⁹ The exception being those lands reserved within the 60-foot-wide neutral boundary at the U.S.-Canada border.

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